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Draft provisions on electronic transferable records

Note by the Secretariat

Addendum

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II. Draft provisions on electronic transferable records (*continued*)

C. Use of electronic transferable records

"***Draft article 13. Time and place of dispatch and receipt of electronic transferable records***

"1. The time of dispatch of an electronic transferable record is the time when it leaves an information system under the control of the originator or of the party who sent it on behalf of the originator or, if the electronic transferable record has not left an information system under the control of the originator or of the party who sent it on behalf of the originator, the time when the electronic transferable record is received.

"2. The time of receipt of an electronic transferable record is the time when it becomes capable of being retrieved by the addressee at an electronic address designated by the addressee. The time of receipt of an electronic transferable record at another electronic address of the addressee is the time when it becomes capable of being retrieved by the addressee at that address and the addressee becomes aware that the electronic transferable record has been sent to that address. An electronic transferable record is presumed to be capable of being retrieved by the addressee when it reaches the addressee's electronic address.

"3. An electronic transferable record is deemed to be dispatched at the place where the originator has its place of business and is deemed to be received at the place where the addressee has its place of business.

"4. Paragraph 2 of this article applies notwithstanding that the place where the information system supporting an electronic address is located may be different from the place where the electronic transferable record is deemed to be received under paragraph 3 of this article."

Remarks

1. At the Working Group's forty-eighth session, it was suggested that a provision on time and place of dispatch and receipt of electronic transferable records, based on article 10 of the Electronic Communications Convention, should be added to the draft provisions (A/CN.9/797, para. 61).

2. The Working Group may wish to consider whether draft article 13, based on a provision designed for the exchange of electronic communications, could adequately provide for electronic transferable records. In particular, the Working Group may wish to clarify its operation in registry systems, which may be considered as a single information system, but where an electronic transferable record might circulate without being sent to or received at an electronic address. Moreover, substantive law on registry-based systems might contain a rule with respect to third parties based on the availability of information in that system, regardless of that information being communicated (see Recommendation 70 of the UNCITRAL Legislative Guide on Secured Transactions (2007)).

3. In the same line, the Working Group may wish to consider the applicability of the draft article to instances when the electronic transferable record, for example in a token-based system, may be transferred by transmission of its storage medium (e.g., USB key or smart card).

4. The Working Group may further wish to consider defining the terms "originator", "addressee" and "electronic address". In this respect, for instance, the Working Group may wish to discuss the relationship between "originator", "issuer", and "transferor" (see also A/CN.9/768, paras. 68-69).

"***Draft article 14. Consent to use an electronic transferable record***

"1. Nothing in this Law requires a person to use an electronic transferable record without its consent.

"2. The consent of a person to use an electronic transferable record may be inferred from the person's conduct."

Remarks

5. Draft article 14 reflects the Working Group's deliberations at its forty-eighth session (A/CN.9/797, paras. 62-63).

["***Draft article 15. Issuance of multiple originals***

"Where the law permits the issuance of more than one original of a paper-based transferable document or instrument, this may be achieved with respect to the use of electronic transferable records by ..."]

Remarks

6. Draft article 15 reflects the Working Group's deliberations at its forty-eighth session (A/CN.9/797, paras. 47 and 68). The Working Group may wish to consider whether this draft article should be retained or if the functions performed by multiple originals in a paper-based environment may be achieved otherwise in an electronic environment.

7. Draft articles 15 and 16 are the only provisions dealing with the issuance of electronic transferable records in the draft provisions (A/CN.9/797, paras. 64-69). With respect to the possibility of issuing an electronic transferable record to bearer, draft article 1, paragraph 2 would facilitate such issuance (A/CN.9/797, para. 65).

"***Draft article 16. Substantive information requirements of electronic transferable records***

"Nothing in this Law requires additional information for the issuance of an electronic transferable record beyond that required for the issuance of a paper-based transferable document or instrument."

Remarks

8. Draft article 16 reflects a decision of the Working Group at its forty-eighth session (A/CN.9/797, para. 73). It states that no additional substantive information is required for the issuance of an electronic transferable record, if that

information is not required for a corresponding paper-based transferable document or instrument.

9. The Working Group may wish to clarify that the information requirement contained in draft article 26(1)(b) (and set forth with respect to paper-based documents or instruments in draft article 26(2)(b)) does not represent an exception to this rule, as those provisions aim at ensuring the perduring availability of information in case of change of medium.

"***Draft article 17. Additional information in electronic transferable records***

"Nothing in this Law precludes the inclusion of information in an electronic transferable record in addition to that contained in a paper-based transferable document or instrument."

Remarks

10. Draft article 17 states that throughout its life cycle, an electronic transferable record may contain information in addition to that contained in a paper-based transferable document or instrument due to the dynamic nature of electronic transferable records (A/CN.9/768, para. 66 and A/CN.9/797, para. 73).

"***Draft article 18. Possession***

"1. Where the law requires the possession of a paper-based transferable document or instrument, or provides consequences for the absence of possession, that requirement is met through the [de facto] control of an electronic transferable record, which shall be established by a reliable method.

"2. An electronic transferable record is subject to control from the time of its issuance until it ceases to have any effect or validity."

Remarks

11. Draft article 18 reflects the Working Group's deliberations at its forty-eighth session (A/CN.9/797, para. 83).

12. The Working Group may wish to consider deleting the words [de facto] in light of the definition of "control" contained in draft article 3 (A/CN.9/797, para. 83).

13. Paragraph 2 has been added to introduce the requirement that control be exercised throughout the life cycle of the electronic transferable record. The Working Group may wish to consider whether the words [from the time of its issuance] should be inserted in paragraph 2 in light of the fact that the draft provisions do not contain a separate provision on issuance.

Draft article 19. Reliability of method for establishing control

14. At the forty-eighth session of the Working Group, three options were suggested with respect to the reliability of the method establishing control (A/CN.9/797, paras. 85-90): (i) a "safe harbour" rule ("Option X"); (ii) a rule containing mandatory minimum requirements for establishing reliability

("Option Y"); and (iii) a rule offering guidance on elements to be considered when assessing reliability.

15. With respect to the rule offering guidance on elements to be considered when assessing reliability, the Working Group may wish to consider the adoption of a general rule on reliability such as the one contained in draft article 11 of Option C (A/CN.9/WG.IV/WP.128, paras. 56-58).

16. In making its deliberations, the Working Group may wish to refer to the definitions of "control" and "holder" contained in draft article 3.

"***Option X***

"A method satisfies draft article 18, and a person is deemed to have control of an electronic transferable record, if the electronic transferable record is issued and transferred in such a manner that:

(a) The uniqueness and integrity of the electronic transferable record are preserved in accordance with draft articles [11 and 12 of Option A];

(b) The electronic transferable record identifies the person [asserting control] [who, directly or indirectly, has [de facto] control over the record]; and

(c) The electronic transferable record is maintained by the person asserting control."

Remarks

17. Option X of draft article 19 aims at providing a safe harbour provision on the reliability of the method used to establish control over an electronic transferable record.

18. Subparagraph (b) of Option X offers alternative language to refer to the person in control (A/CN.9/797, para. 90; see also A/CN.9/WG.IV/WP.124/Add.1, para. 6).

"***Option Y***

"For the purposes of draft articles [11 and 12 of Option A and 18], a method is reliable when it prevents unauthorized access and use and ensures [data] integrity [of the electronic transferable record]."

Remarks

19. Option Y of draft article 19 aims at setting forth mandatory minimum requirements of a reliable method. In doing so, that draft provision may provide general guidance on the interpretation of the notion of "reliable method".

20. The Working Group may wish to discuss whether Option Y should explicitly refer to unauthorized access and use of the system or of the method. The Working Group may also wish to discuss whether paragraph 1 should refer to data integrity in the system or to integrity of the electronic transferable record.

"***Draft article 20. Delivery***

"Where the law requires the delivery of a paper-based transferable document or instrument or provides consequences for the absence of delivery, that requirement is met with respect to the use of an electronic transferable record through the transfer of control of an electronic transferable record."

"***Draft article 21. Presentation***

"Where the law requires the presentation of a paper-based transferable document or instrument or provides consequences for the absence of presentation, that requirement is met with respect to the use of an electronic transferable record by demonstrating that the person has control of the electronic transferable record."

Remarks

21. Draft articles 20 and 21 reflect the Working Group's deliberations at its forty-eighth session (A/CN.9/797, paras. 91-94), and, in particular, the decision to have separate articles on delivery and presentation (A/CN.9/797, para. 93).

"***Draft article 22. Endorsement***

"Where the law requires [or permits] the endorsement of a paper-based transferable document or instrument or provides consequences for the absence of endorsement, that requirement is met with respect to the use of an electronic transferable record when information relating to [the endorsement] [the intention to endorse] is [logically associated or otherwise linked to] [included in] that electronic transferable record and that information is compliant with the requirements set forth in articles 8 and 9."

Remarks

22. Draft article 22 reflects the Working Group's deliberations at its forty-eighth session (A/CN.9/797, paras. 95-97).

23. Draft article 22 highlights the elements necessary for endorsement while retaining the reference to compliance with the requirements for functional equivalence of written form and signature.

24. The Working Group may wish to consider whether the words [the intention to endorse] better reflect the fact that the endorsement takes effect only after the information relating to the intention to endorse is logically associated to the electronic transferable record.

25. The words [or permits] have been added to ensure that cases where the law provides consequences, but does not require an endorsement would also be captured.

26. The words [logically associated or otherwise linked to] are the same terms that refer to the inclusion of information in an electronic transferable record in the definition of "electronic record" contained in draft article 3. The words [included in] are the same terms that refer to the inclusion of information in an electronic transferable record currently used in draft article 24 with respect to amendment of

an electronic transferable record and in other draft provisions. The Working Group may wish to consider which terms are more appropriate and provide guidance on their uniform use in the draft provisions.

27. The Working Group may wish to confirm that issues relating to the validity of an endorsement remain a matter of substantive law.

"***Draft article 23. Transfer of an electronic transferable record***

"1. [To transfer the electronic transferable record, the holder shall transfer the control of the record to the transferee.] [An electronic transferable record is transferred with the transfer of control from the holder to the transferee.]

"2. [[Subject to any rule of law governing the transfer of a paper-based transferable document or instrument] [When permissible under applicable law], the holder may:

(a) Transfer to a named person an electronic transferable record issued or transferred to bearer; or

(b) Transfer to bearer an electronic transferable record issued or transferred to a named person.]"

Remarks

28. Draft article 23 has been recast in light of the deliberations of the Working Group at its forty-eighth session (A/CN.9/797, paras. 98-100).

29. The Working Group may wish to consider adopting standard language for reference to non-mandatory legal requirements (i.e., cases in which the law permits but does not require a certain activity, such as those dealt with in draft articles 15, 22, 23, 24, 25, 27, 28 and 29).

30. Paragraph 2 deals with the possibility for the holder to change the rules for circulation of an electronic transferable record issued to bearer in an electronic transferable record to a named person and with the reverse case ("blank endorsement").

31. The bracketed text in paragraph 2 aims at highlighting the fact that the change in the rules for transfer of the electronic transferable record (i.e., to bearer or to order) must be permissible under applicable substantive law. Differences between the two sets of bracketed text are intended to be editorial only.

32. The Working Group may wish to note that a provision dealing with the possibility of issuing electronic transferable records to bearer has been deleted as that possibility was encompassed in draft article 1, paragraph 2 (A/CN.9/797, para. 65). Accordingly, the Working Group may wish to consider deleting draft article 23, paragraph 2 (A/CN.9/797, para. 99) and clarifying the matter in the explanatory material.

"***Draft article 24. Amendment of an electronic transferable record***

"1. Where the law requires [or permits] the amendment of a paper-based transferable document or instrument [or provides consequences for the absence of an amendment], a reliable method shall be employed for amendment of

information in an electronic transferable record whereby [all] the amended information is [accurately] reflected in the electronic transferable record and is readily identifiable as such.

"2. Upon amendment, a statement to the effect that an amendment has taken place shall be included in the electronic transferable record."

Remarks

33. Draft article 24 has been recast in light of the suggestions received at the forty-eighth session (A/CN.9/797, para. 101). It provides a functional equivalence rule for instances in which an electronic transferable record may be amended.

34. The Working Group may wish to clarify whether all modifications entered in the electronic transferable record after its issuance would be considered an amendment and should therefore satisfy the requirements set forth in draft article 24.

35. The words [or permits] aim at capturing those instances in which applicable substantive law allows for amendment of the electronic transferable record by virtue of party autonomy but does not require it.

36. The words [all] and [accurately] aim at providing drafting options to introduce a duty to document any relevant change in the information contained in the electronic transferable record (A/CN.9/797, para. 72). If draft article 24 applied to all cases of amendment of an electronic transferable record, it could ensure, for instance, proper documentation of the chain of endorsements for an action of recourse (see A/CN.9/WG.IV/WP.124/Add.1, para. 15 and A/CN.9/797, para. 101, subpara. (a)).

37. Draft paragraph 2 aims at satisfying the goal of documenting changes to the electronic transferable record by requiring a statement relating to the amendment. That information requirement might not exist with respect to paper-based transferable documents or instruments due to the fact that amendments on paper are visible as such.

38. The Working Group may wish to consider whether a general standard reliability in draft article 11 of Option C (A/CN.9/WG.IV/WP.128, paras. 56-58) would apply to draft article 24 or whether a separate standard should be included in this draft article.

"***Draft article 25. Reissuance***

"1. When the law permits the reissuance of a paper-based transferable document or instrument, an electronic transferable record may be reissued.

"2. Upon reissuance of an electronic transferable record, a statement to the effect that a reissuance has taken place shall be included in the electronic transferable record."

Remarks

39. Draft article 25 has been recast in light of the suggestions at the forty-eighth session (A/CN.9/797, para. 104). It now aims at providing a general rule on reissuance of electronic transferable records, which is possible whenever

allowed by substantive law. The Working Group may wish to clarify that the provision would apply to issues specific to the use of electronic means, such as the corruption of the method of control of an electronic transferable record.

"***Draft article 26. Replacement***

"1. If a paper-based transferable document or instrument has been issued and the holder and the [issuer/obligor] agree to replace that document or instrument with an electronic transferable record:

(a) The holder shall [present] [surrender] [for replacement] the paper-based transferable document or instrument to the [issuer/obligor];

(b) The [issuer/obligor] shall issue to the holder, in place of the paper-based transferable document or instrument, an electronic transferable record that includes all information contained in the paper-based transferable document or instrument and a statement to the effect that it replaced the paper-based transferable document or instrument; and

(c) [After] [Upon] issuance of the electronic transferable record, the paper-based transferable document or instrument ceases to have any effect or validity.

"2. If an electronic transferable record has been issued and the holder and the [issuer/obligor] agree to replace that electronic transferable record with a paper-based document or instrument:

(a) The holder shall [present] [surrender] [for replacement] [transfer control of] the electronic transferable record to the [issuer/obligor];

(b) The [issuer/obligor] shall issue to the holder, in place of the electronic transferable record, a paper-based document or instrument that includes all information contained in the electronic transferable record and a statement to the effect that it replaced the electronic transferable record; and

(c) [After] [Upon] issuance of the paper-based document or instrument, the electronic transferable record ceases to have any effect or validity.

"3. Parties may consent to replacement at any time prior [or simultaneously] to the replacement.

"4. Replacement according to paragraphs 1 and 2 does not affect the rights and obligations of the parties.

"5. If, in accordance with the procedure set forth in paragraph 1, a paper-based transferable document or instrument has been [terminated] [invalidated], but the issuance of an electronic transferable record has not been perfected for technical reasons, the paper-based transferable document or instrument may be reissued in its original medium [or the replacing electronic transferable record may be issued].

"6. If, in accordance with the procedure set forth in paragraph 2, an electronic transferable record has been [terminated] [invalidated], but the issuance of a paper-based transferable document or instrument has not been perfected for technical reasons, the electronic transferable record may be

reissued in its original medium [or the replacing paper-based transferable document or instrument may be issued]."

Remarks

40. Draft article 26 reflects the suggestions at its forty-eighth session (A/CN.9/797, paras. 102-103).

41. The Working Group may wish to consider whether the word [upon] should be replaced by the word [after] to more accurately indicate that cessation of validity and effect is subject to successful issuance of the replacing record, or document or instrument. Alternatively, the Working Group may wish to consider specifying in draft article 26 that the replaced record, or document or instrument, will cease to have effect or validity only after issuance of its replacement.

42. The Working Group may wish to clarify whether the term "all information" in subparagraph 2(b) refers only to substantive information or includes also technical information specific to the electronic medium (A/CN.9/797, para. 103).

43. The Working Group may wish to further discuss which parties, in addition to the holder, ought to consent to or otherwise be involved in the replacement as it is unlikely that the substantive law would have any provision regarding the change of medium (A/CN.9/761, para. 76). While a replacement would generally require the consent of the obligor(s), the obligor would, in such a case, be able to request a replacement when the document, instrument or record for performance is presented (A/CN.9/768, para. 101). Thus, requiring the obligor's consent for replacement prior to presentation might not be necessary.

44. The Working Group may wish to consider paragraph 3 in conjunction with draft article 14 providing a general rule on consent requirement. It should be noted that paragraph 3 aims at providing the possibility of prior consent to replacement.

45. The Working Group may wish to consider whether to retain paragraph 4, whose purpose is to clarify that substantive rights and obligations are not affected by replacement, or to include such clarification in the explanatory material.

46. Draft article 26, paragraphs 5 and 6 deal with the case in which during the replacement the pre-existing transferable document or instrument, or the electronic transferable record has been destroyed, but for technical reasons the corresponding record, document or instrument has not been issued. Such rule may not be contained in substantive law since it is specific to replacement involving an electronic transferable record.

47. The Working Group may wish to consider whether the word [terminated] is adequate for the purpose of paragraphs 5 and 6, which refers to situations where the paper-based transferable documents or instrument or the electronic transferable record ceases to have any effect or validity as mentioned in subparagraphs 1(c) and 2(c). The word [invalidated] might be another drafting option.

"***Draft article 27. Division and consolidation of an electronic transferable record***

"1. Where the law permits the division or consolidation of a paper-based transferable document or instrument, a reliable method for division or consolidation of an electronic transferable record shall be provided.

"2. If an electronic transferable record has been issued and the holder and the [issuer/obligor] agree to divide the electronic transferable record into two or more electronic transferable records:

(a) The holder shall [transfer] [present for division] the electronic transferable record to the [issuer/obligor];

(b) Two or more new electronic transferable records shall be issued and include: (i) a statement to the effect that division has taken place; (ii) date of division; and (iii) information to identify the pre-existing electronic transferable record and the new electronic transferable records; and

(c) Upon division, the pre-existing electronic transferable record ceases to have any effect or validity and shall include: (i) a statement to the effect that division has taken place; (ii) date of division; and (iii) information to identify the resulting new electronic transferable records.

"3. If the holder of two or more electronic transferable records, the [issuer/obligor] of which is the same, agrees with the [issuer/obligor] to consolidate the electronic transferable records into a single electronic transferable record:

(a) The holder shall [transfer] [present for consolidation] the electronic transferable records to the [issuer/obligor];

(b) The consolidated electronic transferable record shall be issued and include: (i) a statement to the effect that consolidation has taken place; (ii) date of consolidation; and (iii) information to identify the pre-existing electronic transferable records;

(c) Upon consolidation, the pre-existing electronic transferable records cease to have any effect or validity and shall include: (i) a statement to the effect that consolidation has taken place; (ii) date of consolidation; and (iii) information to identify the consolidated electronic transferable record."

Remarks

48. Draft article 27 reflects the Working Group's suggestions at its forty-eighth session (A/CN.9/797, para. 106). In deliberating, the Working Group may wish to refer also to the considerations expressed in A/CN.9/WG.IV/WP.124/Add.1, paragraphs 33-34. The word [transfer] is suggested instead of the word [present] to avoid reference to substantive law notions.

"***Draft article 28. Termination of an electronic transferable record***

"1. Where the law requires or permits the termination of a paper-based transferable document or instrument, a reliable method shall be provided to prevent further circulation of the electronic transferable record.

"2. Where the law requires that a statement to indicate the termination of a paper-based transferable document or instrument be included in the document or instrument, that requirement is met by including a statement in the electronic transferable record to the effect that it has been terminated."

Remarks

49. Draft article 28 reflects the suggestions at the forty-eighth session (A/CN.9/797, para. 106). It now contains a general functional equivalence rule.

50. The Working Group may wish to consider whether a general standard of reliability in draft article 11 of Option C (A/CN.9/WG.IV/WP.128, paras. 56-58) would apply to draft article 28 or whether a separate standard should be included in this draft article.

"***Draft article 29. Use of an electronic transferable record for security right purposes***

"Where the law permits the use of a paper-based transferable document or instrument for security right purposes, a reliable method to allow the use of electronic transferable records for security right purposes shall be provided."

Remarks

51. Draft article 29 reflects the suggestion made at the forty-eighth session that it should be formulated as a functional equivalence rule (A/CN.9/797, para. 106).

52. The Working Group may wish to consider whether a general standard of reliability in draft article 11 of Option C (A/CN.9/WG.IV/WP.128, paras. 56-58) would apply to draft article 29 or whether a separate standard should be included in this draft article.

"***Draft article 30. Retention of [information in] an electronic transferable record***

"1. Where the law requires that a paper-based transferable document or instrument [or information therein] be retained, that requirement is met by retaining an electronic transferable record [or information therein] if the following conditions are satisfied:

(a) The information contained therein is accessible so as to be usable for subsequent reference;

(b) The integrity of the electronic transferable record is assured in accordance with draft article 12 of Option A [, apart from any change that arises from the need to ensure that the record may not further circulate];

[(c) Information [, if any,] enabling the identification of the issuer and holder of the electronic transferable record and the date and time when it was issued and transferred as well as when [it ceases to have any effect or validity][it is terminated] is made available;]

(d) The electronic transferable record is retained in the format in which it was generated, transferred and presented for performance, or in a format

which can be demonstrated to represent accurately the information generated, sent or received; and

[(e) Information enabling the identification of the parties involved in the life cycle of the electronic transferable record and the date and time of their involvement is made available.]

"2. A person may satisfy the requirement referred to in paragraph (1) by using the services of a third party, provided that the conditions set forth in subparagraphs (a)-(e) of paragraph 1 are met."

Remarks

53. Draft article 30 aims at introducing a general rule on retention of electronic transferable records. It is based on article 10 of the UNCITRAL Model Law on Electronic Commerce.

54. The words [, apart from any change that arises from the need to ensure that the record may not further circulate] were added in paragraph 1(b) to reflect the fact that the retained electronic transferable record may no longer circulate.

55. Additional requirements have been added in light of the importance attributed to the accurate recording of the information relating to the circulation of the electronic transferable record (A/CN.9/797, para. 72).

56. The Working Group may wish to consider whether subparagraphs 1(c) and 1(e) should be deleted as they specify the condition expressed in subparagraph 1(b). In that case, the Working Group may wish to consider whether a corresponding comment should be added to the explanatory material.

57. The Working Group may also wish to consider whether the words [, if any,] should be retained in paragraph 1(c) in light of the possibility of issuing and transferring an electronic transferable record to bearer (and not to a named person).

58. The Working Group may wish to consider whether a specific provision on the duty of retention in case of replacement should be added to the draft provisions (A/CN.9/797, para. 104, subpara. (b) and A/CN.9/124/Add.1, para. 43). In that case, the Working Group may wish to consider if that provision should extend also to retention of paper-based transferable documents or instruments, given that substantive law is not likely to provide for replacement, which involves the electronic medium.

D. Third-party service providers

"***Draft article 31. Conduct of a third-party service provider***

"Where a third-party service provider supports the use of an electronic transferable record, that third-party service provider shall:

(a) Act in accordance with statements made by it with respect to its policies and practices;

(b) Exercise reasonable care to ensure the accuracy of all statements made by it;

(c) Provide reasonably accessible means that enable a relying party to ascertain from an electronic transferable record information about it;

(d) Provide reasonably accessible means that enable a relying party to ascertain, where relevant, from an electronic transferable record:

(i) The method used to identify the [issuer/obligor] and the holder;

(ii) That the electronic transferable record retained its integrity and has not been compromised;

(iii) Any limitation on the scope or extent of liability stipulated by the third-party service provider;

(e) Use trustworthy systems, procedures and human resources in performing its services."

"***Draft article 32. Trustworthiness***

"For the purposes of article 31, subparagraph (e) in determining whether, or to what extent, any systems, procedures and human resources utilized by a third-party service provider are trustworthy, regard may be had to the following factors:

(a) Financial and human resources, including existence of assets;

(b) Quality of hardware and software systems;

(c) Procedures for processing of electronic transferable record;

(d) Availability of information to related parties;

(e) Regularity and extent of audit by an independent body;

(f) The existence of a declaration by the State, an accreditation body or the third-party service provider regarding compliance with or existence of the foregoing; and

(g) Any other relevant factor."

59. Based on articles 9 and 10 of the UNCITRAL Model Law on Electronic Signatures, draft articles 31 and 32 on third-party service providers had already been revised in light of the considerations by the Working Group, bearing in mind the principle of technological neutrality (A/CN.9/768, paras. 107-110). They are provided for guidance purposes only, encompassing all third-party service providers (A/CN.9/761, para. 27).

60. The placement of these draft articles would depend on the final form of the draft provisions. Moreover, it was suggested that those draft articles ought to be placed in an explanatory note as they are regulatory in nature (A/CN.9/797, para. 107).

61. The Working Group may also wish to clarify the meaning of the term "relying party" in draft article 31 (A/CN.9/797, para. 107).

E. Cross-border recognition of electronic transferable records

"***Draft article 33. Non-discrimination of foreign electronic transferable records***

"1. An electronic transferable record shall not be denied legal effect, validity or enforceability on the sole ground that it was issued or used in a foreign State [, or that its issuance or use involved the services of a third party based, in part or wholly, in a foreign States] [, if it offers a substantially equivalent level of reliability].

"2. Nothing in this Law affects the application of rules of private international law governing a paper-based transferable document or instrument to electronic transferable records."

Remarks

62. At the forty-fifth session of the Commission in 2012, the need for an international regime to facilitate the cross-border use of electronic transferable records was emphasized.[1] The Working Group also reiterated the importance of cross-border legal recognition of electronic transferable records (A/CN.9/761, paras. 87-89).

63. Draft article 33 aims at eliminating obstacles to cross-border recognition of an electronic transferable record arising exclusively from its electronic nature.

64. The Working Group may wish to clarify if, for instance, under draft article 33, an electronic transferable record issued in a jurisdiction that does not permit the issuance and use of electronic transferable records, but otherwise compliant with substantive law requirements of that jurisdiction, could be recognized in another jurisdiction enacting draft article 33.

65. The Working Group may wish to consider whether a requirement of substantially equivalent level of reliability should be introduced in the draft provisions. The words [, if it offers a substantially equivalent level of reliability] may be found in article 12, paragraph 3 of the UNCITRAL Model Law on Electronic Signatures.

66. Paragraph 2 reflects the Working Group's understanding that the draft provisions should not displace existing private international law applicable to paper-based transferable documents or instruments (A/CN.9/768, para. 111).

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[1] *Official Records of the General Assembly, Sixty-seventh Session, Supplement No. 17* (A/67/17), para. 83.